Labor Services, Inc. *and* International Brotherhood of Electrical Workers, Local 99, AFL-CIO, CLC. Case 1-CA-19743

November 24, 1982

DECISION AND ORDER

Upon a charge filed on April 8, 1982, by International Brotherhood of Electrical Workers, Local 99, AFL-CIO, CLC, herein called the Union, and duly served on Labor Services, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on May 3, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 7, 1982, following a Board election in Case 1-RC-17208, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 26, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 12, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On June 2, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 15, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in response to the Notice To Show Cause Respondent admits that it refused and continues to refuse to recognize the Union as the exclusive bargaining representative of its employees. In defense of its conduct, Respondent contests the validity of the certification issued by the National Labor Relations Board. Specifically, Respondent asserts that the Union's conduct prior to and during the election constituted objectionable election interference in that the Union purchased drinks for the voting employees at the bar of the motor lodge where the election was conducted. The General Counsel asserts that Respondent improperly seeks to relitigate issues which were or could have been litigated in the underlying representation proceeding. We agree with the General Counsel.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence,[3] nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

[1] Official notice is taken of the record in the representation proceeding, Case 1-RC-17208, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended. The Board's Decision and Certification of Representative is reported at 259 NLRB 959 (1982).

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] In its response to the Notice To Show Cause, Respondent urges the Board to order a hearing to consider as new evidence "public reaction" since the Board's decision issued as exemplified by certain newspaper articles.

We find no merit in Respondent's contention. Newly discovered evidence will not warrant a second hearing unless it is evidence of facts in existence at the time of the first hearing which could not be discovered by reasonable diligence, and the evidence must be so material as to require a different result. *N.L.R.B.* v. *Jacob E. Decker and Sons*, 569 F.2d 357 (5th Cir. 1978); *Mary Thompson Hospital*, 241 NLRB 766 (1979). Nothing advanced by Respondent in its response comes within the definition of newly discovered evidence or is material to any issue in this case.

Respondent also contends that the Board's Decision and Certification issued January 7, 1982, in which it adopted the Regional Director's Report on Objections, was in violation of Sec. 102.69 (g) of the Board's Rules and Regulations since the Board did not have the entire record before it. Contrary to Respondent, the affidavits on which the Regional Director relies were submitted by Respondent and the Petitioner as allowed by Sec. 102.69(g) and were considered by the Board. Further, a review of those affidavits shows that no factual issue requiring a hearing was raised thereby and that, in reaching his decision, the Regional Director assumed the truth of Respondent's evidence in support of its objections.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation with an office and place of business at 10 Pommenville Road, Pawtucket, Rhode Island, and an office and place of business at 39 Lamartine Street, Worcester, Massachusetts, is now and continually has been engaged in providing electrical services valued in excess of $50,000 to business in the contruction industry which are themselves directly engaged in interstate commerce.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local 99, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All journeymen, electricians and apprentices employed by the Employer from its Pawtucket, Rhode Island location and who work in the Employer's Pawtucket, Rhode Island area of operations; but excluding all other employees including all office clerical employees, professional employees, truck drivers, stock clerks, part-time employees who work less than 20 hours a week, estimators, draftsmen, salesmen, guards and supervisors as defined in the Act.

2. The certification

On April 22, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on January 7, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 24, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 26, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 26, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Labor Services, Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328

F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Labor Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 99, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All journeymen, electricians and apprentices employed by the Employer from its Pawtucket, Rhode Island, location and who work in the Employer's Pawtucket, Rhode Island, area of operations; but excluding all other employees including all office clerical employees, professional employees, truck drivers, stock clerks, part-time employees who work less than 20 hours a week, estimators, draftsmen, salesmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 7, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 26, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Labor Services, Inc., Worcester, Massachusetts, and Pawtucket, Rhode Island, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, Local 99, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All journeymen, electricians and apprentices employed by the Employer from its Pawtucket, Rhode Island location and who work in the Employer's Pawtucket, Rhode Island area of operations; but excluding all other employees including all office clerical employees, professional employees, truck drivers, stock clerks, part-time employees who work less than 20 hours a week, estimators, draftsmen, salesmen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Labor Services, Inc., copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER ZIMMERMAN, concurring:

I dissented from my colleagues' determination to issue a certification of representative in te underlying representation proceeding, 259 NLRB 959 (1982). I adhere to the views I expressed there.

Nonetheless, a majority of the Board approved that certification. It has long been our rule to prohibit relitigation in a certification testing unfair labor practice proceeding of issues that were or could have been determined in the underlying representation case. I believe that salutary rule should apply to Board Members with the same force with which it applies to litigants. Theefore, I shall join my colleagues in granting the General Counsel's motion for Summary Judgment, because Respondent raises no issues here that were not or could not have been litigated in the underlying proceeding. See *Bravos Oldsmobile, Inc.*, 254 NLRB 1056, 1058–59 (1981) (Member Zimmerman, specially concurring).

CHAIRMAN VAN DE WATER, dissenting:

In the underlying representation case, I would not have issued a certification of representative for the reasons set forth in the dissenting opinion therein.[5] Therefore, contrary to my colleagues, I would deny the General Counsel's Motion for Summary Judgment and would, instead, dismiss the complaint.

[5] 259 NLRB 959 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, Local 99, AFL–CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All journeymen, electricians and apprentices employed by the Employer from its Pawtucket, Rhode Island location and who work in the Employer's Pawtucket, Rhode Island area of operations; but excluding all other employees including all office clerical employees, professional employees, truck drivers, stock clerks, part-time employees who work less than 20 hours a week, estimators, draftsmen, salesmen, guards and supervisors as defined in the Act.

LABOR SERVICES, INC.